

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston

DONALD E. LARGENT,

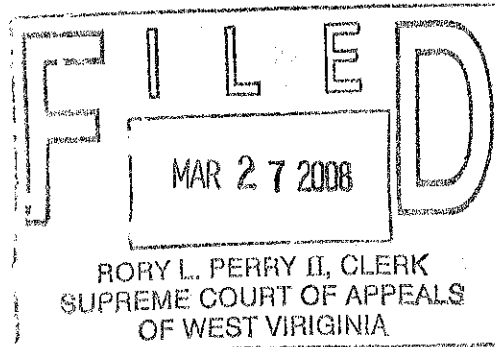
Appellant

v.

Appeal No. 33832

ZONING BOARD OF APPEALS
FOR THE TOWN OF PAW PAW
AND THE TOWN OF PAW PAW,
a municipal corporation,

Appellees.



APPELLANT'S REPLY BRIEF

Michael L. Scales, Esquire
Greenberg & Scales, P.L.L.C.
314 W. John Street
P.O. Box 6097
Martinsburg, WV 25402-6097
(304) 263-0000
WV Bar No. 3277

Counsel for Appellant

March 25, 2008

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NOW COMES Appellant, Donald E. Largent, by counsel, Michael L. Scales, Esquire and the law firm of Greenberg & Scales, P.L.L.C., of Martinsburg, West Virginia, and respectfully present Appellant's Reply Brief pursuant to Rules 10(c) of the Rules of Appellate Procedure, as follows:

I. DISCUSSION OF LAW

- A. There is an absolute requirement under Chapter 8, Article 24 for the adoption of a comprehensive plan by a municipality at least at the time of the initial adoption of a zoning ordinance in order for that zoning ordinance to have been lawfully adopted.**

Appellees' position is that there was no requirement at the time the Town of Paw Paw first adopted its Zoning Ordinance in 1972 for there to have been a comprehensive plan adopted. Appellees' position is just plain wrong.

§8-24-16 of the *Code*, first adopted in 1959, states in salient portion as follows: "A planning commission shall make and recommend for adoption to the governing body of the

municipality or to the county court, as the case may be, a comprehensive plan for the physical development of the territory within this jurisdiction...”

How much clearer could that be? “Shall” is mandatory.

In *McFillan v. Berkeley County Planning Com’n*, 190 W.Va. 458, 438 S.E. 2d 801

(1993), syl. pt. 1, this Honorable High Court stated as follows:

Under W.Va. *Code*, 8-24-1, *et. seq.*, the governing body of a municipality or the county commission may create a planning commission to develop a comprehensive plan for zoning, building restrictions and subdivision regulations. ***Thereafter***, the governing body or the county commission may adopt all or part of such comprehensive plan. [Emphasis added here].

This Honorable High Court continued within the body of the case in the opinion, 438 S.E.

2d, at 805:

The subdivision control provisions are part of a larger statutory scheme dealing with planning, zoning, and development of a comprehensive plan. *See* W.Va. Code, 8-24-1, *et seq.* Initially, under W.Va. Code 8-24-1 (1969), the “governing body of every municipality and the county court [county commission] of every county may by ordinance create a planning commission [.]” The creation and composition of municipal and county planning commissions are outlined in W.Va. Code, 8-24-5 (1986), and W.Va. Code, 8-24-16 (1986). Under W.Va. Code, 8-24-16 (1969), a planning commission “shall make and recommend for adoption to the governing body... a comprehensive plan for the physical development of the territory within its jurisdiction.”

Nothing could be clearer that the 1959 act, and recodified in 1969, clearly requires a planning commission to adopt and recommend a comprehensive plan before a zoning ordinance is adopted by a municipality, and Appellees’ assertion otherwise is just plain wrong.

B. §§8-24-39 through 65 of the *Code* must be read in *pari materia* with the prior sections of article 24, chapter 8 of the *Code*, including §§8-24-16 through 19 of the *Code* as part of the “larger statutory scheme”.

On page 4 of the Appellees’ memorandum, Appellees attempt to compartmentalize §8-24-39 through 65 of the *Code* as not being part of the larger

statutory scheme of planning and zoning simply because a comprehensive plan was not specifically discussed in those statutory sections. However, as stated in *McFillan, supra.*, 438 S.E. 2d, 805-806, this Honorable High Court stated as follows:

It is clear from the comprehensive nature of the provisions in W.Va. Code, 8-24-1, *et seq.*, that the historic distinction we have made between planning and zoning has been largely obliterated because both concepts are now incorporated into a comprehensive plan. W.Va. Code, 8-24-39 (1988), gives broad zoning authority power over a variety of different subjects. Moreover, a comprehensive subdivision plan under W.Va. Code, 8-24-28, may contain both zoning and building restrictions through the use of the term "comprehensive plan".

Thus, we believe that under W.Va. Code, 8-24-1, *et seq.*, the governing body of a municipality or the county commission may create a planning commission to develop a comprehensive plan for zoning, building restrictions and subdivision regulations. Thereafter, the governing body or the county commission may adopt all or parts of such a comprehensive plan.

It is clear that §§8-24-39 through 65 are all part of a *comprehensive* article enacted by the Legislature for all types of land use regulations, including planning and zoning, and all require a comprehensive plan pursuant to W.Va. Code §8-24-16, *et. seq.* of the *Code*.

At the time the Town of Paw Paw first enacted its zoning ordinance in 1972, undoubtedly the provisions of §8-24-16, *et. seq.*, had been adopted by the Legislature and were part of the comprehensive plan for land use planning in West Virginia whether it be for subdivision control, building restrictions, or zoning.

C. This Honorable High Court must give effect to all portions of the statute if possible when construing it.

It is axiomatic that this Honorable High Court, in construing §8A-7-12 of the *Code* [2004] must give effect to all portions of the statute when construing it.

In §8A-7-12 of the *Code* [2004], the Honorable Court must give legal effect to the provision "...legally adopted under prior acts", and that provision is unambiguous, and simply

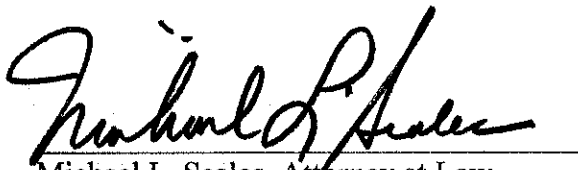
means that the zoning ordinance in this case must have been legally adopted under the law in effect at the time it was adopted. By 1972, the Legislature had adopted §8-24-1 *et. seq.* in 1959, and recodified in 1969. In 1959 and 1969, §8-24-16, *et seq.* of the *Code* had been adopted requiring that a comprehensive plan be adopted prior to or contemporaneous with the adoption of a zoning ordinance. The fact that the Town of Paw Paw does not have a comprehensive plan now, and did not have one at the time that it adopted its zoning ordinance in 1972 renders it “not legally adopted under prior acts”, and the Town of Paw Paw’s zoning ordinance does not receive the benefit of §8A-7-12 of the *Code*, and renders it fatally defective.

II. CONCLUSION

For the foregoing reasons, the zoning ordinance of the Town of Paw Paw must be stricken as not legally adopted under §8-24-16 *et. seq.* of the *Code*, and this Honorable High Court must reverse the decision of the Circuit Court of Morgan County, West Virginia, granting Appellees’ Motion for Summary Judgment, with instructions to the Circuit Court to grant Appellant’s Motion for Summary Judgment below and stricken the zoning ordinance of the Town of Paw Paw as being void and without legal effect.

Most respectfully submitted this 25th day of March, 2008.

Donald E. Largent, Appellant
By Counsel



Michael L. Scales, Attorney at Law
Counsel for Appellant
Greenberg & Scales, P.L.L.C.
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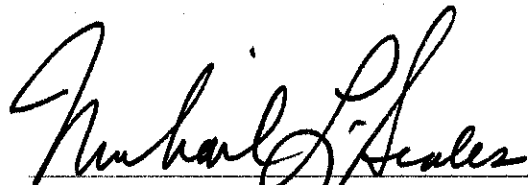
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CERTIFICATE OF SERVICE

I, Michael L. Scales, Attorney for Appellant, Donald E. Largent, do hereby certify that I have served a true copy of the foregoing APPELLANT'S REPLY BRIEF upon Appellees, by mailing a true copy thereof to their counsel, Christopher D. Janelle, Esquire, at his address of Sutton & Janelle, P.L.L.C., 125 E. King Street, Martinsburg, WV 25401, this 25th day of March, 2008.



Michael L. Scales, Attorney at Law